

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 ANDREW L. MEEKS, II,

4 Plaintiff

5 v.

6 NEVADA DEPARTMENT OF
7 CORRECTIONS, et. al.,

8 Defendants

Case No.: 3:18-cv-00431-MMD-WGC

**Report & Recommendation of
United States Magistrate Judge**

Re: ECF Nos. 56, 57, 58

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10 This Report and Recommendation is made to the Honorable Miranda M. Du, Chief
11 United States District Judge. The action was referred to the undersigned Magistrate Judge
12 pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

13 Defendants filed a Motion for Judgment on the Pleadings (ECF No. 56) or Motion to Stay
14 Proceedings (ECF No. 57) on the basis that another judge from the District of Nevada has
15 certified questions to the Nevada Supreme Court concerning whether a private cause of action
16 exists for prisoner civil rights claims under the Nevada Constitution. Defendants' motion also
17 argues that the State and NDOC never waived their Eleventh Amendment immunity, and
18 therefore, this court has no jurisdiction over them.

19 Plaintiff subsequently filed a Motion to Voluntarily Dismiss the State Constitutional
20 Claims. (ECF No. 58.) He also filed a response to the motion for judgment on the pleadings,
21 noting he had agreed to voluntarily dismiss the state constitutional claims. (ECF No. 59.)

22 After a thorough review, it is recommended that Plaintiff's motion to voluntarily dismiss
23 the state law constitutional claims be granted, and that Defendants' pending motion for judgment
on the pleadings and motion to stay be denied as moot insofar as they request judgment on the

1 pleadings as to the state law constitutional claims and a stay pending resolution of the questions
2 concerning a private right of action under the state constitutional provisions by the Nevada
3 Supreme Court. The motion for judgment on the pleadings should also be denied insofar as it can
4 be interpreted as arguing that the court does not have jurisdiction over the State and NDOC with
5 respect to the state law tort claims of assault and battery.

6 **I. BACKGROUND**

7 Plaintiff is an inmate in the custody of the Nevada Department of Corrections (NDOC),
8 proceeding pro se with this action pursuant to 42 U.S.C. § 1983. (Compl., ECF No. 8.)

9 Following Defendants' motion for summary judgment, the following claims remain in
10 this action: (1) a First Amendment retaliation claim against Vest and a corollary claim under
11 Article 1, Section 9 of the Nevada Constitution in Count I; (2) a First Amendment retaliation
12 claim against Vest, Escamilla and Cook, and a corollary claim under Article 1, Section 9 of the
13 Nevada Constitution in Count II; (3) an Eighth Amendment excessive force claim against Vest
14 and a corollary claim under Article 1, Section 6 of the Nevada Constitution, as well as State law
15 tort claims for assault and battery in Count III; (4) a First Amendment retaliation claim against
16 Vest and a corollary claim under Article 1, Section 9 of the Nevada Constitution in Count IV;
17 and (5) a First Amendment retaliation claim against Vest and a corollary claim under Article 1,
18 Section 9 in Count V. (*See* ECF Nos. 7, 43, 46.)

19 Defendants filed a motion for judgment on the pleadings asserting that there is not a
20 private cause of action under these Nevada constitutional provisions, and alternatively, requested
21 that the court stay proceedings pending resolution of questions certified to the Nevada Supreme
22 Court by another district judge on this issue. (ECF Nos. 56, 57.) Their motion for judgment on
23

1 the pleadings also asserts that the State of Nevada and NDOC never waived their Eleventh
2 Amendment rights; therefore, this court does not have jurisdiction over the state law claims.

3 Plaintiff subsequently filed his motion to voluntarily dismiss the state law constitutional
4 claims. (ECF No. 58.)

5 **II. DISCUSSION**

6 **A. State Constitutional Claims**

7 Plaintiff has moved to voluntarily dismiss his state constitutional claims. (ECF No. 58.)
8 The court recommends that this motion be granted, and that Defendants' motion for judgment on
9 the pleadings and motion to stay the case (ECF Nos. 56, 57) be denied as moot insofar as the
10 state constitutional claims are concerned.

11 **B. State Tort Claims**

12 In their motion for judgment on the pleadings, Defendants include an argument that the
13 State of Nevada and NDOC never waived their Eleventh Amendment immunity, and so the court
14 does not have jurisdiction over them.¹ That argument includes a statement that the court does not
15 have supplemental jurisdiction to hear the *state tort claims*. There is no other direct reference to
16 the state tort claims of assault and battery in the motion, but the court interprets the motion as
17 arguing that the court does not have jurisdiction over the State and NDOC with respect to the
18 state tort claims of assault and battery because the State and NDOC are indispensable parties and
19 they have not waived their sovereign immunity.

21
22 ¹ The motion to stay is not applicable to this issue as it only requested a stay pending resolution
23 of the questions certified to the Nevada Supreme Court which concern whether there is a private
right of action under certain provisions of the Nevada Constitution. The questions certified to the
Nevada Supreme Court do not address Eleventh Amendment sovereign immunity for State tort
claims where the State is an indispensable party in a case removed to federal court.

1 This argument is foreclosed by *Lapides v. Board of Regents of University System of*
2 *Georgia*, 535 U.S. 613 (2002).

3 It was noted in the screening order that the NDOC removed this case to federal court;
4 therefore, the Eleventh Amendment is not a bar to this court's consideration of the state law
5 claims. (ECF No. 7 at 1, n. 1.)

6 The State of Nevada has generally waived sovereign immunity for state tort claims in
7 state court. Nevada Revised Statute (NRS) 41.031(1). "In any action against the State of Nevada,
8 the action must be brought in the name of the State of Nevada on relation of the particular
9 department, commission, board or other agency of the State whose actions are the basis for the
10 suit." NRS 41.031(2). In addition, to bring a tort action arising out of an action or omission with
11 the scope of a person's public duties or employment, a plaintiff must name the State or
12 appropriate political subdivision as a party defendant. NRS 41.0337.

13 "The Eleventh Amendment grants a State immunity from suit in federal court by citizens
14 of other states, U.S. Const. amend. XI, and by its own citizens as well[.]" *Walden v. Nevada*, 945
15 F.3d 1088, 1092 (9th Cir. 2019) (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)). "States can waive
16 their Eleventh Amendment sovereign immunity from suit in state and federal court." *Id.* (citing
17 *Lapides v. Bd. of Regents of Univ. Sys. Of Ga.*, 535 U.S. 613, 618-21 (2002)).

18 With respect to cases filed in federal court, the State of Nevada has not expressly waived
19 its immunity from suit conferred by the Eleventh Amendment. NRS 41.031(3). As such, in
20 general, the State of Nevada and arms of the state cannot be sued in federal court. *See O'Connor*
21 *v. State of Nev.*, 686 F.2d 749, 750 (9th Cir. 1982) (holding that "Nevada has explicitly refused
22 to waive its immunity to suit under the eleventh amendment . . . The Supreme Court has made it
23 clear that section 1983 does not constitute an abrogation of the eleventh amendment immunity of

1 the states.”). In *Stanley v. Trustees of California State University*, 433 F.3d 1129 (9th Cir. 2006),
2 the Ninth Circuit held that 28 U.S.C. § 1367 does not abrogate state sovereign immunity for
3 supplemental state law claims. *Id.* at 1133-34.

4 When, however, a state has enacted a statute that waives its immunity from suit on state
5 law claims in state court, and then the state voluntarily removes an action asserting state law
6 claims from state court to federal court, “that State waives its Eleventh Amendment immunity
7 from suit.” *Walden*, 945 F.3d at 1092 (citing *Lapides*, 535 U.S. at 618-21).

8 In *Lapides*, the plaintiff brought section 1983 claims as well as state law tort claims
9 against Georgia in state court. *Lapides*, 535 U.S. at 616. Georgia had a statute that waived its
10 sovereign immunity for state law claims filed in state court. *Id.* (Ga. Code Ann. § 50-21-23).
11 Georgia removed the action to federal court, and then moved to dismiss based on Eleventh
12 Amendment immunity. With respect to the state law claims for which Georgia had explicitly
13 waived sovereign immunity in state court, the Supreme Court found it was inconsistent for the
14 state to remove the case to federal court and invoke the federal court’s jurisdiction, and then
15 claim immunity under the Eleventh Amendment. *Id.* at 619.

16 “Therefore, under *Lapides*, a State that statutorily waives its immunity from suit on state-
17 law claims in state court also waives its Eleventh Amendment immunity from suit on the same
18 state-law claims when it voluntarily removes a state-law claim case to federal court.” *Walden*,
19 945 F.3d at 1093.

20 Here, Nevada, like Georgia, has a statutory waiver of sovereign immunity for state tort
21 claims in state court. NRS 41.031(1). As in *Lapides*, Plaintiff filed this action asserting claims
22 under section 1983 as well as state law constitutional and tort claims in state court. (ECF No. 1-
23 2.) Like in *Lapides*, NDOC voluntarily removed the case to federal court. (ECF No. 1.) The State

1 and NDOC have not cited any circumstance which would take this case out of the realm of the
2 general rule that voluntary removal constitutes a waiver of sovereign immunity. Therefore, the
3 court finds that Nevada and NDOC waived sovereign immunity with respect to the state law tort
4 claims of assault and battery when Nevada has waived immunity for such claims in state court,
5 and then they removed this action from state court to federal court.

6 Insofar as Defendants' motion seeks judgment on the pleadings as to the state law tort
7 claims of assault and battery on this basis, the motion should be denied.

8 If this report and recommendation is adopted, the following claims will remain in this
9 action: (1) a First Amendment retaliation claim against Vest in Count I; (2) a First Amendment
10 retaliation claim against Vest, Escamilla, and Cook in Count II; (3) Eighth Amendment
11 excessive force and state law tort claims of assault and battery against Vest in Count III; (4) a
12 First Amendment retaliation claim against Vest in Count IV; and (5) a First Amendment
13 retaliation claim against Vest in Count V.

14 **III. RECOMMENDATION**

15 IT IS HEREBY RECOMMENDED that the District Judge enter an order:

16 **GRANTING** Plaintiff's motion to voluntarily dismiss his remaining state constitutional
17 claims (ECF No. 58);

18 **DENYING AS MOOT** the motion to stay this proceeding while the certified questions
19 to the Nevada Supreme Court are pending (ECF No. 57);

20 **DENYING AS MOOT** the motion for judgment on the pleadings (ECF NO. 56) insofar
21 as it relates to the state constitutional claims; and
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